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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

FRANCISCO ROBERTO FAUSTO-RENDON,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

WHETHER THE DISTRICT COURT'S DENIAL OF JURISDICTION ON THE GROUNDS THAT DEFENDANT, IN WAIVING HIS RIGHT TO APPEAL AS PART OF A PLEA AGREEMENT, WAIVED THE RIGHT TO APPEAL ANY AND ALL SUBSEQUENT LEGAL PROCEEDINGS UNFORESEEABLE TO DEFENDANT AT THE TIME OF WAIVER, WAS VIOLATIVE OF DEFENDANT'S FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

No. _____

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The Petitioner, FRANCISCO ROBERTO FAUSTO-RENDON, respectfully requests a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Ninth Circuit.

DECISION BELOW

United States v. Francisco Roberto Fausto-Rendon, 46 F. 3d 1146 (9th Cir. 1995). (Attachment A)

SUPREME COURT JURISDICTION

On January 29, 1995 the Ninth Circuit of Appeals dismissed Petitioner's appeal from the United States District Court for

the District of Arizona on the grounds that the Court of Appeals lacked jurisdiction over the matter. Thus, this Petition is timely filed pursuant to Rules 13 and 29, Rules of the Supreme Court.

This court has jurisdiction under Title 28, United States Code § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property without due process of law; . . .

STATEMENT OF THE CASE

On January 5, 1994, an indictment was filed in the United States District Court for the District of Arizona charging Defendant with conspiracy to possess, and possession with intent to distribute a quantity of marijuana in violation of Title 21 § 841 (a) (1).

On March 22, 1994, Defendant FAUSTO-RENDON entered into a plea agreement with the government which included a provision that Defendant FAUSTO-RENDON agree to waive all rights to appeal.

On May 31, 1994, Defendant FAUSTO-RENDON was sentenced to a term of incarceration of 36 months. Statutory time limits for the Government to seek post sentence relief lapsed, and, at that time the crimi-

nal proceedings against Defendant FAUSTO-RENDON were concluded.

Subsequent to the resolution of the criminal proceedings against Defendant FAUSTO-RENDON, and after the time in which to file a request for post sentence relief lapsed, the Government instituted new proceedings, purely procedural in nature, by filing a Motion to Correct Defendant FAUSTO-RENDON'S sentence.

The district court granted the Government's Motion for Modification of Sentence, extending Defendant FAUSTO-RENDON'S sentence from a period of incarceration of thirty six months to a period of sixty months.

Defendant FAUSTO-RENDON appealed the district court's ruling on the grounds that the district court erred in granting the Government's motion to correct his sentence because (1) the sentencing Court did not timely grant relief under Fed. R. Crim. P. 35(c), (2) the government failed to timely seek relief under Rule 35(a), and (3) the government is not entitled to substantive relief under Rule 35(a).

The Court of Appeals denied jurisdiction to hear the case "because Fausto waived his right to appeal in his plea agreement."

REASONS FOR GRANTING THE WRIT

THE DENIAL OF JURISDICTION BY THE NINTH CIRCUIT COURT OF APPEALS SERVES TO SANCTION THE DISTRICT COURT'S DE-

PARTURE FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The usual and accepted course of judicial proceedings regarding criminal matters is set forth in the Federal Rules of Criminal Procedure. The district court's granting the Government's Motion for Modification of Sentence beyond the time frame provided by the Rules for so doing was a substantial departure from the accepted and usual course of judicial proceedings.

By denying jurisdiction to hear the appeal, the Court of Appeals sanctions the district court's departure from the usual and accepted course of judicial proceedings as set forth in the Rules.

In so doing, the Court of Appeals violates Defendant FAUSTO-RENDON'S right to due process of law insofar as he is foreclosed from seeking relief for the Government's misconduct, and the Government is immune from being held accountable therefore.

Should the Court of Appeals opinion stand, with every plea agreement whereby a defendant waives his rights to appeal, the Government is free to conduct proceedings subsequent thereto unchecked and without threat of review.

In the case at bar, the subject plea agreement was entered into between Defendant FAUSTO-RENDON and the Government as

the mechanism for disposing of the narcotics charges for which FAUSTO-RENDON had been indicted. In executing the plea agreement, Defendant FAUSTO-RENDON waived any right to appeal substantive issues pertaining to those charges, including any adverse rulings on pretrial motions.

Defendant FAUSTO-RENDON did not waive the right to appeal any and all subsequent legal proceedings, as yet unforeseeable, that may be levied against him by the Government at some future date. Such was the understanding and intention of Defendant FAUSTO-RENDON when he entered into the agreement. Such is the understanding of any Defendant who enters into a plea agreement and must contend with future proceedings brought by the Government after the case is presumably disposed of and time for relief has lapsed.

Thus, in denying jurisdiction, Defendant FAUSTO-RENDON is bound, without due process of law, by a provision of the plea agreement that is contrary to his understanding and intention.

With all due respect, due process mandates Defendant FAUSTO-RENDON the opportunity to have the merits of his appeal considered.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests this Court issue a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED this 12th day of May, 1995.

NELSON & TORRALBA, P.C

Homero Torralba
Attorney of Record for Petitioner

Stellisa Scott

ATTACHMENT A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 94-10412

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANCISCO ROBERTO FAUSTO-RENDON, aka Francisco R. Fausto-Rendon,

Defendant-Appellant

Appeal from the United States District Court for the District of Arizona William D. Browning, District Judge, Presiding
(D.C. No. CR-94-00007-WDB

Submitted January 25, 1995**

Before; WALLACE, Chief Judge, HALL and KLEINFELD, Circuit Judges

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MEMORANDUM*

Francisco Roberto Fausto-Rendon appeals his sentence under the Sentencing

Guidelines imposed following the district court's correction of his sentence after his guilty plea to possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841 (a) (1) and (b) (1) (vii).

Fausto Contends that the district court erred in granting the government's motion to correct his sentence because the sentencing court did not timely grant relief under Fed. R. Crim. P. 35(c), the government failed to seek timely relief under Rule 35(a), and the government is not entitled to substantive relief under Rule 35 (a).

The government contends that this court lacks jurisdiction because fausto waived his right to appeal in this plea agreement. We agree. See United States v. Navarro-Botello, 912 F. 2d 318 (9th Cir. 1990), cert. denied, 112 S. Ct. 1488 (1992. Because the plea agreement expressly states that "the defendant agrees to waive all rights to appeal," we reject Fausto's argument that the intended his waiver to apply only to substantive issues relating to the criminal charges for which he had been indicated.

DISMISSED.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

(2)

No. 94-1902

Supreme Court, U.S.
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JUL 27 1995
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In the Supreme Court of the United States

OCTOBER TERM, 1995

FRANCISCO ROBERTO FAUSTO-RENDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner waived his right to appeal his sentence in his plea agreement.

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In the Supreme Court of the United States

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FRANCISCO ROBERTO FAUSTO-RENDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1A-2A) is unpublished, but the judgment is noted at 46 F.3d 1146 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1995. The petition for a writ of certiorari was filed on May 1, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the District of Arizona to pos-

session of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). On May 31, 1994, he was sentenced to 36 months' imprisonment. Three weeks later, the government filed a motion to correct petitioner's sentence. The district court granted the motion and resentenced petitioner to 60 months' imprisonment. The court of appeals dismissed petitioner's appeal. Pet. App. 2A.

1. Petitioner pleaded guilty to possession of approximately 985 pounds of marijuana with intent to distribute it. The plea agreement contained a 60-month cap on incarceration, and petitioner agreed to waive "all rights to appeal." Plea Agreement ¶¶ 3, 5.

Under 21 U.S.C. 841(b)(1)(B)(vii), the mandatory minimum sentence for a violation of Section 841(a)(1) involving more than 100 kilograms of marijuana is 60 months' imprisonment. The government did not move for departure below the statutory minimum. Nevertheless, on May 31, 1994, the district court sentenced petitioner to 36 months' imprisonment, without making any findings to support a departure below the statutory minimum. Gov't C.A. Br. 4, 8.

2. On June 22, 1994, the government filed a motion to correct petitioner's sentence, pointing out that the statute required a 60-month minimum sentence. After holding a hearing on the government's motion, the district court granted the motion and, on August 4, 1994, issued an amended judgment imposing a sentence of 60 months' imprisonment. Gov't C.A. Br. 4.

3. On appeal, petitioner claimed that the district court erred in granting the government's motion to correct his sentence because that motion was not filed within seven days of the imposition of the original sentence, as required by Fed. R. Crim. P.

35(c). Pet. App. 2A. In response, the government argued that the court of appeals lacked jurisdiction because petitioner had waived his right to appeal in his plea agreement. Gov't C.A. Br. 6.

The court of appeals agreed with the government that the express language of the plea agreement waived petitioner's right to appeal his sentence, and the court dismissed petitioner's appeal without reaching the merits of his claim under Rule 35(c). Pet. App. 2A.

ARGUMENT

1. Petitioner contends (Pet. 5) that he agreed to waive his appeal rights only with respect to the substantive issues in the indictment. He claims that the resentencing was an unforeseeable subsequent legal proceeding not contemplated by the plea agreement. That argument is precluded by the broad language of petitioner's appeal waiver. Petitioner cites no authority for the proposition that his agreement "to waive all rights to appeal" did not encompass the right to appeal an amended sentence. Plea Agreement ¶ 5.

The courts of appeals that have considered the validity of sentence appeal waivers have uniformly held that such waivers are valid so long as they are knowing and voluntary. See *United States* v. *Schmidt*, 47 F.3d 188, 190 (7th Cir. 1995); *United States* v. *Attar*, 38 F.3d 727, 731 (4th Cir. 1994), cert. denied, 115 S. Ct. 1957 (1995); *United States* v. *Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993), cert. denied, 115 S. Ct. 652 (1994); *United States* v. *Melancon*, 972 F.2d 566, 567-568 (5th Cir. 1992); *United States* v. *Rivera*, 971 F.2d 876, 896 (2d Cir. 1992); *United States* v. *Rutan*, 956 F.2d 827, 829-830

(8th Cir. 1992); *United States* v. *Navarro-Botello*, 912 F.2d 318, 321-322 (9th Cir. 1990), cert. denied, 503 U.S. 942 (1992). Petitioner has not advanced a claim that his appeal waiver was either unknowing or involuntary.

2. Because petitioner waived all rights to appeal, the court of appeals did not reach the merits of petitioner's contention that the district court lacked power to correct his sentence after the time allowed in Fed. R. Crim. P. 35(c). Petitioner now argues that the court of appeals' failure to review the merits of his claim that the district court lacked jurisdiction violates his due process rights. Pet. 4-5. There is, however, no constitutional bar to petitioner's voluntary surrender of his statutory right to obtain appellate review of particular claims that he might have had in this case. See *United States* v. *Mezzanatto*, 115 S. Ct. 797, 801-802 (1995) (absent an "affirmative indication of Congress' intent to preclude waiver," statutory rights are "subject to waiver by voluntary agreement of the parties"; upholding defendant's waiver of rights under Fed. R. Evid. 410 and Fed. R. Crim. P. 11(e)(6)).

Petitioner argues that, by signing the plea agreement containing the waiver of all rights to appeal, he did not thereby waive his right to appeal with respect to future, "unforeseeable" legal proceedings. Pet. 5. Petitioner's inability to anticipate the specific grounds on which he might later wish to appeal, however, is not a reason to invalidate his waiver. See *Navarro-Botello*, 912 F.2d at 320 (fact that defendant did not know the nature of possible appeals when he signed plea agreement does not render agreement involuntary); *Rutan*, 956 F.2d at 830 (rejecting defendant's argument that he could not

waive an unknown right). Petitioner executed his waiver knowing that sentencing proceedings would follow, and he could readily foresee that procedural errors might occur in them. His waiver of all rights to appeal necessarily extended to such potential appellate issues.

The courts of appeals have recognized certain circumstances in which defendants who have signed waivers of rights to appeal retain the right to appellate review on limited grounds. See, *e.g.*, *Attar*, 38 F.3d at 732 (examining scope of waiver-of-appeal-rights provision). This case does not present any of those situations: Petitioner was not "sentenced entirely at the whim of the district court," or in excess of the maximum penalty provided by statute, *ibid.*; nor was a sentence imposed in violation of certain fundamental and immutable constitutional guarantees, *ibid.*; *Bushert*, 997 F.2d at 1350 n. 18; nor was a sentence imposed that violated the negotiated agreement, *Navarro-Botello*, 912 F.2d at 321; *Schmidt*, 47 F.3d at 190 (waiver would not prevent an appeal where sentence imposed is not in accordance with negotiated agreement); *Rutan*, 956 F.2d at 829-830 (same). Rather, petitioner was sentenced in precise accord with the terms of his plea agreement. Indeed, the applicable statutory mandatory minimum sentencing provision required the sentence he received.

In sum, because petitioner waived his right to appeal knowingly and voluntarily, and because there was no reason not to honor that waiver, the court of appeals correctly dismissed petitioner's appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1995